United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1359

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To Be Argued by
MARTIN M. BAXTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER CAPARRO,

Plaintiff-Appellant,

against

KONINKLIJKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPIJ, N.V.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

APPELLANT'S BRIEF

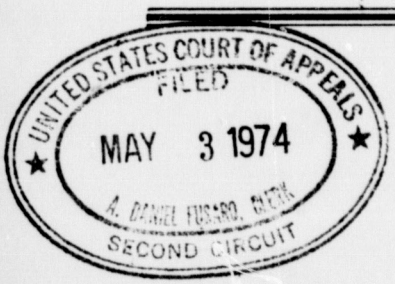

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TABLE OF CONTENTS

Cases Cited

United States Constitution Cited

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APPELLANT'S BRIEF

Preliminary Statement

This is an appeal by Peter Caparro, the above-named plaintiff-appellant (hereinafter "plaintiff") from the orders and two judgments of the United States District Court for the Southern District of New York (Tyler, D.J.) which granted the motion of Koninklijke Nederlandsche Stoomboot Maatschappij, N.V., the defendant-appellee (hereinafter "shipowner"), dismissing plaintiff's claim of negligence and, upon the jury bringing in a ver-

dict in favor of the plaintiff on the issue of unseaworthiness, granting shipowner judgment notwithstanding the verdict and providing further, that if this Court or the Supreme Court reverses the judgment, then shipowner is entitled to a new trial on the issue of unseaworthiness.

Statement of the Issues Presented by the Appeal

1. Did the Court commit reversible error as a matter of law in setting aside the jury's verdict of unseaworthiness?

2. Did the Court err in conditionally granting a new trial on the issue of unseaworthiness if this Court or the Supreme Court reverses the judgments below.

The Facts

Plaintiff was a longshoreman employed by Northeast Terminal & Stevedoring Company on September 17, 1971 as a holdman aboard the HERCULES (25a) berthed at the 39th Street Pier in Brooklyn (26a).

He was an extra man that day in Salica's gang (26a), went aboard the vessel at about 8:00 A.M. and proceeded to No. 2 lower hold where he and his gang loaded general cargo (27a) during the morning without incident (28a).

At about 4:45 P.M., about 15 minutes before the 5:00 P.M. quitting time, plaintiff was injured (28a).

For about five or ten minutes before his accident, plaintiff and his gang were loading and stowing, by means of a hi-lo, cardboard cartons having thin metal straps about ½ inch wide around them (28a).

During the course of the morning and afternoon plaintiff and his co-workers physically stowed smaller cargo but a hi-lo was used to stow heavier pieces (30a).

There was only one hi-lo machine in No. 2 lower hold (31a).

At the time of the accident the hi-lo was operated by Salica (34a) and plaintiff was standing on a case (30a) about 17 feet long and 1½ feet wide by 1½ feet high (33a) which rested on top of an automobile chassis stowed about three high (32a).

Salica picked up a carton with the hi-lo's forks and told plaintiff to guide it (31a) into a space on top of the stow under the coaming on the offshore side and plaintiff went up and stood on the aforesaid long narrow case resting on the chassis and was guiding the carton in (32a) by talking to the hi-lo driver and telling him where to put the carton (33a) and the carton was in fact put into the space (34a).

The carton thus stowed was about 4 feet by 4 feet by 4 feet and weighed heavier than 250 pounds (35a).

After Salica withdrew the forks and backed the hi-lo away, plaintiff heard something crackling and then a carton underneath gave way and the newly stowed carton fell down breaking a strap and hit the case he was standing on, knocking him over landing on his back and elbows on the steel chassis and rolling over onto the floor (36a).

On cross-examination he testified that the hi-lo had backed out and the forks were out from under the carton before the carton fell (38a).

The Testimony of the Witness, Pacuilla

Mr. Pacuilla testified that he had been a longshoreman for about 23 years and he and the plaintiff were regular members of Angelo DiCristina's gang but on the day of the accident (45a) were broken up and worked in Salica's gang aboard the HERCULES docked at the 39th Street Pier in Brooklyn and were employed by Northeast Terminal and Stevedoring Company working in No. 2 hatch lower hold (46a).

He and his gang worked without incident in the morning and in the afternoon they continued to load and stow general cargo, cases, cartons with the aid of a hi-lo machine (47a).

At about 20 minutes to 5:00 P.M. (47a) he saw Salica operating the hi-lo placing a carton on top of other cargo and that would have finished that side of the wing (48a).

Salica stowed the carton, backed the hi-lo out and made a sort of L-turn and about 10 or 15 seconds later the same carton fell down and hit the case plaintiff was standing on (48a).

He heard a crackling sound, the cartons under the just stowed carton started to give way under the pressure, the strap broke and the heavy carton measuring something like 6 feet by 3 feet by 3 feet fell as described above (49a).

Shipowner offered no evidence at all but its counsel was content to rest his defense on cross-examination only.

The trial commenced at 10 AM, the jury retired to deliberate at 2:15 PM and returned with their verdict in favor of the plaintiff at 2:35 PM (15a, 87a).

POINT I

As a matter of law a jury question was presented whether plaintiff's accident occurred as a result of unseaworthiness.

The ship in the instant case was unseaworthy because the carton just stowed in place was too heavy for the cartons underneath causing them to give way under the weight and as a result the just stowed carton some 10 or 15 seconds later fell striking the case plaintiff was standing on, injuring him.

In *Usner* v. *Luckenbach Overseas Corp.*, 400 U S 494, 1971 A. M. C. 277, the Supreme Court stated that unseaworthiness is a condition and how that condition came into being, whether by negligence or otherwise is quite irrelevant to shipowner's liability for personal injuries resulting from it; that a vessel's condition of unseaworthiness migth arise from any number of circumstances including *the method of loading her cargo or the manner of its stowage* citing *Atlantic & Gulf Stevedores Inc.* v. *Ellerman,* 269 U S 355, 1962 A. M. C. 565, and *Gutierrez* v. *Waterman SS Co.,* 373 U S 206, 1963 A. M. C. 1649.

In the instant case, as soon as the hi-lo stowed the carton in place and withdrew its forks and made an L-turn, a dangerous and unseaworthy condition came into being in the hatch and the accident occurred because of it.

In *Venable* v. *A/S Det Forenede Dampskibsselskab,* 399 F2d 347, 1968 A. M. C. 1437 (4 Cir.) cert. den. 404 U. S. 1059, the court stated that *Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539, 1960 A.M.C. 1503, answered affirmatively the question of whether a shipowner is responsible for an unseaworthy condition created by a member of the crew or a longshoreman working on board.

This Court has held that the absolute and non-delegable duty of the shipowner to provide a seaworthy vessel includes the duty to provide proper stowage, the shipowner being liable for improper stowage created by the longshoremen themselves.

Rich v. *Ellerman & Bucknall S.S. Co., Ltd.,* 278 F2d 704, 1960 A. M. C. 1580 (2 Cir.) and *Reddick* v. *McAllister Lighterage Line, Inc.,* 258 F2d 297, 1958 A. M. C. 1819 (2 Cir.).

Causation or what actually happened are questions of fact, *Ellerman Lines Ltd.* v. *The Steamship President Harding,* 288 F.2d 288, 292, 1961 A. M. C. 2137 (2 Cir.); *Mamiye Bros.* v. *Barber Steamship Lines, Inc.,* 360 F.2d 774, 777, 1966 A. M. C. 1165 (2 Cir.).

In *Atlantic & Gulf Stevedores, Inc., supra,* the Supreme Court quoted with approval from its earlier decision in *Byrd* v. *Blue Ridge R.E.C.,* 356 U.S. 525, 538, 539, 78 S. Ct. 893, 901, that the Federal policy favoring jury decisions of disputed fact questions is based upon the Seventh Amendment to the United States Constitution. It pointed out that the Court must search for the view of the case that upholds the verdict and that for the Court to do otherwise would be violative of the Seventh Amendment. It held that there were presented factual questions which could not be *re-determined* by either the Court of Appeals or itself just as the District Court could not *predetermine* those factual issues (cf. *Siderewicz* v. *Enso Gutzeit,* 453 F.2d 1094, 1972 A.M.C. 326 [2d Cir. 1972]).

In *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 110, the following was quoted with approval from *Tennant* v. *Peoria and Pekin Union R. Co.,* 321 U.S. 29, 35, 64 S. Ct. 409, 412:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It is submitted that the court below committed reversible error as a matter of law and the jury verdict in favor of the plaintiff should be reinstated and the conditional order for a new trial be set aside and vacated.

This was a short and simple trial taking less than five and a half hours. The jury was correctly given the applicable law by the court and was persuaded by plaintiff's witnesses and his counsel's summation as to the fact of the unseaworthiness of the vessel.

CONCLUSION

By reason of the foregoing it is respectfully submitted that the orders and judgments appealed from herein should be reversed and the jury's verdict reinstated.

Respectfully submitted,

ZIMMERMAN & ZIMMERMAN,
Attorneys for Plaintiff-Appellant.

MARTIN M. BAXTER,
of Counsel.

Services of three (3) copies of
the within Appellant's Brief is
hereby admitted this 2nd day
of May , 1974

Burlingham Underwood & Lord.
Attorney for Def-Appellee